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No. 04-184

Supreme Court, U.S.
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In The

Supreme Court of the United States

C.M.C.,

Petitioner,

versus

G.A.L. and V.K.L.,

Respondents.

On Petition For Writ Of Certiorari To The Colorado Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondents would state that the following more accurately reflects the issues raised by Petitioner's Petition for Writ of Certiorari:

1. Whether the Petitioner timely and properly raised the federal question before the Colorado Courts?

2. Whether the Parental Kidnaping Prevention Act is applicable to this case?

3. Whether the Questions Presented for Review in Petitioner's Petition for Writ of Certiorari warrant this Court's review?

4. Whether the provisions of the Full Faith and Credit Clause of the United States Constitution are implicated in this case?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Authorities	iii
Citations of the Official Reports	1
Statement of the Basis of Jurisdiction	1
Constitutional and Statutory Provisions	1
Statement of the Facts and Case	3
Argument	7
Conclusion	21

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83 (1997) 8

Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987) 8

E.E.B. v. D.A., 446 A.2d 871 (N.J. 1982) 11, 12

Elrick v. Merrill, 10 P.3d 689 (Colo.App. 2000) 8

In the Interest of B.A.S., 25 Ga.App. 430 (2002) 9

In the Interest of E.L.M.C., ____ P.3d ____ (Colo.App. 2004) 15

In re Clausen, 502 N.W.2d 649 (Mich. 1993) 12, 14, 15

In re Custody of C.C.R.S., 892 P.2d 246 (Colo. 1995) 16

In re Custody of C.M., 74 P.3d 342 (Colo.App. 2002) 16

Kreimer v. Chemical Constr. Co., 456 U.S. 461 (1982) 20

LaChance v. Erickson, 522 U.S. 262 (1988) 20

Lassiter v. Department of Social Servs. of Durham Cty., 452 U.S. 18 (1981) 11

Matsushita Elec. Industrial Co. v. Epstein, 516 U.S. 367 (1996) 20

M.L.B. v. S.L.J, 519 U.S. 102 (1996) 11

Thompson v. Thompson, 484 U.S. 174 (1988) 10

Troxel v. Granville, 530 U.S. 57 (2000) 16

United States v. Locke, 471 U.S. 84 (1985) 9

Webb v. Webb, 451 U.S. 493 (1981) 8

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. IV, Sect. 1 20

STATUTES

28 U.S.C. 1738A ..... *passim*

C.R.S. 14-10-103 6

C.R.S. 14-10-123 ..... 1, 17

C.R.S. 14-13-103 ..... 1, 10

Mo. Rev. Stat. 453.040 20

RULES

Colorado Appellate Rule 21 6

United States Supreme Court Rule 10(b) 12, 15

United States Supreme Court Rule 14(1)(g)(i) 8

SECONDARY AUTHORITY

Waller, Greg, *When the Rules Don't Fit the Game: Application of the Uniform Child Custody Jurisdiction Act and PKPA to Interstate Adoption Proceedings*, 33 Harv. J. on Legis. 271 (1996) 9, 20

CITATIONS OF THE OFFICIAL REPORTS

As stated in the Petition for Writ of Certiorari.

STATEMENT OF THE BASIS FOR JURISDICTION

As stated in the Petition for Writ of Certiorari

CONSTITUTIONAL AND STATUTORY PROVISIONS

As stated in the Petition for Writ of Certiorari. Additionally:

C.R.S. 14-13-103. Proceedings governed by other law

This article does not govern an adoption proceeding or a proceeding pertaining to the authorization of emergency medical care for a child.

C.R.S. 14-10-123. Commencement of proceedings concerning allocation of parental responsibilities – jurisdiction

(1) A proceeding concerning the allocation of parental responsibilities is commenced in the district court or as otherwise provided by law:

(a) By a parent;

(I) By filing a petition for dissolution or legal separation; or

(II) By filing a petition seeking the allocation of parental responsibilities

with respect to a child in the court where the child is permanently resident or where the child is found; or

(b) By a person other than a parent, by filing a petition seeking the allocation of parental responsibilities for the child in the county where the child is permanently resident, or where the child is found, but only if the child is not in the physical care of one of the child's parents;

(c) By a person other than a parent who has had the physical care of a child for a period of six months or more, if such action is commenced within six months of the termination of such physical care; or

(d) By a parent or person other than a parent who has been granted custody of a child or who has been allocated parental responsibilities through a juvenile court order entered pursuant to section 19-1-104(6), C.R.S., by filing a certified copy of a juvenile court order in the county where the child is permanently resident. Such order shall be treated in the district court as any other decree issued in a proceeding concerning the allocation of parental responsibilities.

(2) Except for a proceeding concerning the allocation of parental responsibilities commenced pursuant to paragraph (d) of subsection (1) of this section, notice of the proceeding concerning the allocation of parental responsibilities

> shall be given to the child's parent, guardian, and custodian or person allocated parental responsibilities, who may appear and be heard and may file a responsive pleading. The court may, upon a showing of good cause permit the intervention of other interested parties.

STATEMENT OF THE FACTS AND CASE

The subject child was born on April 18, 2003 in the State of Missouri and was voluntarily placed with the Respondents by the Petitioner almost immediately after the child's birth for purposes of adoption. At or about the time of placement, Petitioner signed a Transfer of Temporary Custody and Appointment of Power of Attorney for Care of Child in favor of Respondents. This document provided that if Petitioner changed her mind regarding the adoption plan that she would reimburse Respondents $20.00 per day for which they had the child in their care. (Petition for Writ of Certiorari pg. 1 and Appendix to Petition for Writ of Certiorari pg. 10-11). Petitioner has neither reimbursed the Respondents nor offered to reimburse the Respondents.

On or about April 21, 2003, Respondents filed an adoption action in the Circuit Court of St. Charles County, Missouri seeking the termination of the parental rights of the Petitioner and the biological father to the subject child and Respondents ultimate adoption (hereinafter "adoption action"). The Missouri Court approved the placement of the child with the Respondents and the Respondents returned to their home in Jefferson County, Colorado. (Appendix to Petition for Writ of Certiorari pg. 10-11).

Subsequent thereto, however, the Court refused to accept Petitioner's consent to the adoption based on a technical defect in the form she presented to the Court. Specifically, Petitioner had failed to identify the biological father of the subject child as required by Missouri law. (*Id.* at 11-12). On July 25, 2003, some three (3) months after the child's birth and placement with Respondents, Petitioner filed a Motion to Withdraw and Revoke her Consent to the adoption. (*Id.* at 12). The same was granted on August 22, 2003. Importantly, the Missouri Court's Order stated nothing regarding the custody of the minor child, physical, legal or otherwise. (App. 1).

On October 15, 2003, after the child was almost six (6) months old and had resided essentially all of his life in Colorado, the Missouri Court, without holding an evidentiary hearing[1], dismissed the adoption action and awarded "physical custody of the minor child" to Petitioner. Specifically, the Missouri Court determined that no factual basis existed to terminate the Petitioner's parental rights in absence of Petitioner's consent under Missouri law despite Respondents' allegations to the contrary. (Appendix to Petition for Writ of Certiorari pg. 100-110). Respondents had alleged as grounds for involuntary termination of Petitioner's parental rights under Missouri law that Petitioner had abandoned the child and that her mental condition was such that she was "unable to knowingly provide the child with the necessary care, custody and

[1] *See* App. 31 where Petitioner states "*After hearing arguments of counsel, and after allowing the parties to brief the issues,* the [Missouri] court entered a ruling finding that the consent to terminate parental rights were revoked and that Respondent had not abandoned the child." (Emphasis added).

control." (*Id.* at 104-105). Respondents subsequently filed a Motion to Vacate Judgment with the Missouri Court. (*Id.* at 13). The Court, in denying the Motion on January 2, 2004, acknowledged that the Missouri case was not a custody proceeding stating:

> "'*An adoption proceeding is not a forum for determination of custody between parents.' The court here is not determining whether Mother or the minor child's alleged father should have custody as between them.* Rather, the court is determining as a matter of law that Mother has effectively withdrawn her consent to the termination of her parental rights and the adoption of the minor child by [Respondents] and that Mother has not abandoned the minor child. The consequence of that determination is that the child shall be returned to Mother's custody. *Any determination of whether Mother or the alleged father should have custody must necessarily await another proceeding.*" (Citation omitted) (Emphasis added) (*Id.* at 114-115).

The Court's denial of the Motion to Vacate Judgment did not indicate that Missouri would exercise continuing jurisdiction to determine the custody of the child. (*Id.*). Respondents appealed the dismissal of the adoption action to the Missouri Court of Appeals but later dismissed the same. (Petition for Writ of Certiorari pg. 4-5).

Prior to the Missouri Court's denial of the Motion to Vacate Judgment, and after the child had been in the Respondents care and lived in Colorado in excess of six (6) months, Respondents filed in the District Court for Jefferson County, Colorado a Verified Petition for Allocation of

Parental Responsibilities[2] (hereinafter "custody action") regarding the minor child. (Appendix to Petition for Writ of Certiorari pg. 15-16). In response to this Petition, Petitioner filed a Petition for Writ of Habeas Corpus and a Motion to Dismiss the Respondents' custody action. (*Id.* at 16). On or about December 4, 2004, the Jefferson County District Judge was contacted by the Missouri Judge to discuss the adoption action and the custody action. (*Id.* at 17, n. 9). No notice was given to the parties regarding this discussion. As a part of the conversation the Jefferson County District Judge concluded that the Order dismissing the adoption action in Missouri divested Colorado of jurisdiction over the custody action. (*Id.*). On January 8, 2004 Respondents filed a Response to the Motion to Dismiss and requested Post-Trial Relief. (*Id.* at 17). On January 13, 2004 the Jefferson County District Court entered an order denying Respondent's post-trial relief. (*Id.*).

Within one (1) week of the January 13, 2004 Order, Respondents filed a Petition for Rule to Show Cause with the Colorado Supreme Court pursuant to Colorado Appellate Rule 21 requesting that the Jefferson County District Court's Writ of Habeas Corpus and Order dismissing the custody action be reversed. (*Id.* at 17-18). Respondents argued, in part, that the adoption action was not a custody proceeding as contemplated by Colorado's Uniform Child Custody and Enforcement Act and therefore Respondents had standing to bring an "initial child-custody" proceedings in the State of Colorado, and even if the adoption action constituted a

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[2] Colorado now uses the term "parental responsibilities" in place of the word "custody." In changing this terminology, the Colorado General Assembly's purpose was not to modify the meaning of the term "custody." C.R.S. § 14-10-103(4).

custody proceeding, Missouri's Order granting physical custody of the child to Petitioner was not entitled to full faith and credit as no evidentiary hearing regarding the best interests of the child was held. The Colorado Supreme Court issued a Rule to Show Cause on January 20, 2004. (*Id.* at 18). Petitioner filed a Response to the Rule to Show Cause. Contrary to Petitioner's assertions, she made absolutely no mention of the Parental Kidnaping Prevention Act of 1980 prior to the issuance of the Colorado Supreme Court's opinion. (App. 2 – App. 38). The Colorado Supreme Court made its Rule absolute finding that neither Colorado law, Missouri law, nor federal or interstate laws governing interstate custody disputes would mandate that Colorado not exercise jurisdiction to determine the best interests of the minor child. The matter was remanded back to the Jefferson County District Court for hearing on the child's best interests. (Appendix to Petition for Writ of Certiorari pg. 1-93).

Petitioner filed a Petition for Rehearing with the Colorado Supreme Court on April 26, 2004 arguing for the first time that the Court's ruling was contrary to the Parental Kidnaping Prevention Act of 1980. The same was denied on May 3, 2004. (*Id.* at 116-117 and Petition for Writ of Certiorari pg. 8). This appeal followed.

ARGUMENT

1. Whether the Petitioner timely and properly raised the federal question before the Colorado Courts?

Contrary to Petitioner's assertions in her Petition for Writ of Certiorari, she did not raise the issue of the applicability of the Parental Kidnaping Prevention Act of 1980

(hereinafter "PKPA") in her Response to the Colorado Supreme Court's Order to Show Cause. Rather, this issue was raised for the first time by Petitioner in her Petition for Rehearing filed pursuant to Colorado Appellate Rules 40 after the Colorado Supreme Court had rendered its opinion. United States Supreme Court Rule 14(1)(g)(i) states, in pertinent part, "If review of state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on writ of certiorari." In Colorado, issues not raised in the parties' briefs before an appellate court will not be addressed on a Petition for Rehearing. *Elrick v. Merrill*, 10 P.3d 689, 696 (Colo.App. 2000).

Further, this Court has generally refused to consider issues raised for the first time in a Petition for Rehearing before the state courts. "It is well settled that this Court will not review a final judgment of a state court unless 'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.' Appellant did not present the issue squarely to the state courts until they filed their petition for rehearing with the court of appeals." *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 550 (1987) *citing Webb v. Webb*, 451 U.S. 493, 496-497 (1981).

Nevertheless, the Colorado Supreme Court did address the applicability of the PKPA in its opinion. *See Adams v. Robertson*, 520 U.S. 83, 92 (1997) ("we have generally refused to consider issues raised for the first time in a petition for rehearing when the state court is

silent on the issue."). To the extent the Court believes the federal question was "timely and properly raised" before the Colorado Courts, Respondents address the substance of the Petition.

2. Whether the Parental Kidnaping Prevention Act is applicable to this case?

The PKPA applies to "child custody determinations." 28 U.S.C. 1738A(a). A "custody determination" is defined as "a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications." One of the general rules of statutory construction is that words and phrases are to be given their plain and ordinary meaning. *See United States v. Locke*, 471 U.S. 84 (1985). Petitioner assumes, without discussion, that the adoption action in Missouri constitutes a "child custody determination" within the meaning of the PKPA.

Respondents would assert that the adoption action does not constitute a "child custody determination." *See In the Interest of B.A.S.*, 25 Ga.App. 430 (2002) (Questioning whether the PKPA applies to an adoption proceeding.) In fact, "the legislative history of the PKPA does not discuss the application of the statute to adoptions or prospective adoptive parents." Waller, Greg, *When the Rules Don't Fit the Game: Application of the Uniform Child Custody Jurisdiction Act and PKPA to Interstate Adoption Proceedings*, 33 Harv. J. on Legis. 271, 284 (1996). Respondents interpretation of the PKPA not applying to an adoption proceeding is consistent with the terms of the Uniform Child Custody Jurisdiction and Enforcement Act (hereinafter "UCCJEA").

The PKPA was enacted "to provide for a nationwide enforcement of custody orders made in accordance with the terms of the UCCJA."[3] *Thompson v. Thompson*, 484 U.S. 174, 181 (1988). Specifically, Colorado's UCCJEA states that its provisions do "not govern an adoption proceeding." C.R.S. 14-13-103.

3. Whether the Questions Presented for Review in Petitioner's Petition for Wrti of Certiorari warrant this Court's review?

Assuming that Petitioner "timely and properly raised" the issue of the PKPA and that the PKPA is applicable to an adoption proceeding Respondents address the contentions of Petitioner that this case warrants review by this Court. Petitioner argues that the Colorado Supreme Court erred in how it interpreted 28 U.S.C. 1738A(f) in finding that Missouri declined to exercise jurisdiction over the child custody issue, and because it did so, it further erred in failing to enforce the Missouri order and granting a custody hearing while the Missouri action was pending.

At first blush, in reviewing Petitioner's Petition for Writ of Certiorari, it would appear that the Colorado Supreme Court decided to simply ignore the proceedings in Missouri. This is not accurate. Rather the Colorado Supreme Court specifically acknowledged the adoption action in Missouri and indicated that it was required to give the dismissal of the adoption action full faith and credit. (Appendix to Petition for Writ of Certiorari pg. 19). The Colorado Supreme Court simply acknowledged the

[3] The UCCJA or Uniform Child Custody Jurisdiction Act is the predecessor to the UCCJEA.

very real difference between adoption cases and custody cases. *See M.L.B. v. S.L.J*, 519 U.S. 102, 118 (1996) *citing* (Blackmun, J., dissenting) *Lassiter v. Department of Social Servs. of Durham Cty.*, 452 U.S. 18, 39 (1981) ("A termination of parental rights is both total and irrevocable. Unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child. . . .")

a. The Missouri Court declined to exercise continuing jurisdiction over the issue of custody of the minor child.

The Missouri Court did in fact decline to exercise continuing jurisdiction over the issue of custody of the minor child. This is the case for two reasons. First, as the Colorado Supreme Court so held, Missouri failed to hold a evidentiary hearing regarding the best interests of the child (or any evidentiary hearing for that matter) and the same operates as a declination of jurisdiction under the PKPA. In so holding, the Court followed the reasoning of the New Jersey Supreme Court in *E.E.B. v. D.A.*, 446 A.2d 871 (N.J. 1982) a case with substantial similarities to the case at bar. Second, the Missouri Court itself determined that the issue of custody was not a proper one to be heard in an adoption case. As a result, that determination had to "necessarily await another proceeding." The bottom line is that the case at bar is extremely fact specific and review of the Colorado Supreme Court's decision by this Court will not have broad implications.

28 U.S.C. 1738A(a) states that "The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a

court of another state." 28 U.S.C. 1738A(f) states that "A court of a state may modify a determination of custody of the same child made by a court of another State, if. . . . (2) the court of the other State no longer has jurisdiction, or *it has declined to exercise such jurisdiction to modify such determination*." (Emphasis added). Here, the Colorado Supreme Court, finding that the Missouri Court failed to hold a hearing on the best interests of the child in determining custody, held the same constituted a declination of jurisdiction pursuant to 28 U.S.C. 1738A(f). Again, this was in accord with the New Jersey Supreme Court decision in *E.E.B.*

Petitioner argues that because the Michigan Supreme Court reached a contrary holding in *In re Clausen*, 502 N.W.2d 649 (Mich. 1993) this Court should review the issue pursuant to United States Supreme Court Rule 10(b). The *Clausen* case is easily distinguished from the facts of the case at bar. *Clausen* involved a failed adoption proceeding in Iowa. The Iowa Court, after voiding its termination order as to the biological father, ordered the prospective adoptive couple to "return the child to the physical custody of [biological father]." *Id.* at 653. Thereafter, the prospective adoptive couple filed a custody action in their home state of Michigan. The Michigan Supreme Court found that it was precluded from deciding the custody of the child as Iowa continued to have continuing jurisdiction to make that determination. "The courts of this state, may only modify Iowa's order if Iowa has declined to exercise jurisdiction to modify it. 28 U.S.C. 1738A(f). Iowa has not declined to modify its custody order, it has simply declined to order the relief sought by [the prospective adoptive parents.]" *Id.* at 659. In so

holding, the Michigan Supreme Court placed a great deal of emphasis on the fact that the Iowa case was ongoing:

> "Iowa law provides for continuing jurisdiction in custody matters, and the Iowa courts regarded themselves as continuing to have jurisdiction of the case: the order of December 3, 1992, terminating the DeBoers' right to custody and appointing Daniel Schmidt as custodian, and the order of January 27, 1993, holding the Deboers in contempt. Because the Iowa custody determination was made consistently with the terms of the PKPA, and because Iowa's jurisdiction continues, the Iowa court's order must be enforced." *Id.* at 672.

This situation is quite different from the case at bar. As was referred to above and will be discussed below, the Missouri case was not ongoing. The adoption action was dismissed in its entirety. In dismissing the case the Court did not indicate that it retained jurisdiction to determine custody but rather indicated that an adoption case was not an appropriate forum to decide custody and the same would necessarily have to await another proceeding.

The fact that Missouri had dismissed its case was not specifically found by the Colorado Supreme Court to be a declination of jurisdiction under 28 U.S.C. 1738A. One can assume that this was because the Colorado Supreme Court assumed for purposes of its opinion that the Missouri Order was a custody determination implicating the provisions of the PKPA. It is clear, however, that the Court was in no way convinced of this issue:

> "The conundrum here is that if we view Missouri as having addressed the custody issue at all, it was only as a part of having recognized that the

> adoption failed. Hence, the order was a part of an adoption proceeding and the UCCJEA does not apply. If, on the other hand, we view the adoption and custody proceedings as separate proceedings, then Missouri has entered no custody order and Colorado will have initial original jurisdiction." (Appendix of Petition for Writ of Certiorari pg. 46).

Because the facts in *Clausen* show that the proceedings in Iowa were ongoing, unlike in the present case where the Missouri Court had dismissed the case all together and ruled that custody had to await another proceeding, there is no reason for this Court to review the Colorado Supreme Court's decision.

The *Clausen* decision can also be distinguished from the case at bar as the parties in that case were in fact afforded an evidentiary hearing. Specifically, in *Clausen* after termination of the rights of the birth mother and the individual she had alleged was the birth father had been entered the birth mother advised the Iowa Court that she had lied about the birth father's identity and in fact a Daniel Schmidt was the birth father. *Id.* at 658. "[T]he district court in Iowa conducted a bench trial on the issues of paternity, termination of parental rights, and adoption. . . . [T]he district court found that Schmidt established by a preponderance of the evidence that he was the biological father of the child; that the DeBoers failed to establish by clear and convincing evidence that Schmidt had abandoned the child or that his parental rights should be terminated." *Id.* No such evidentiary hearing was afforded to Respondents in this case even though they had alleged that Petitioner had abandoned the child or was

otherwise unable to parent the child based on her mental condition.[4]

Based on the substantial distinguishing facts in the *Clausen* case versus the case at bar, Respondents would assert that "a state court of last resort has [not] decided an important federal question in a way that conflicts with the decision of another state court of last resort." United States Supreme Court Rule 10(b). As a result, review by this Court of the Colorado Supreme Court's decision is not warranted.

Petitioner mistakenly asserts that "Colorado, in resolving custody disputes between a parent and a non-parent, does not recognize the natural parent's liberty interest in raising her child, but instead applies a 'best interest' standard as between the non-parent and the parent." (Petition for Writ of Certiorari pg. 22). This is simply inaccurate. For example, in *In the Interest of E.L.M.C.*, ___ P.3d ___ (Colo.App. 2004) the Colorado Court of Appeals held as follows:

> "Application of parental responsibilities – parenting time and decision making responsibilities – by a nonparent implicates the constitutional right of family autonomy and privacy. 'A legislative enactment that infringes on a fundamental

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[4] Respondents acknowledge that the Colorado Supreme Court ruled that Missouri's declination of jurisdiction was based on the Missouri Court's failure to hold a hearing on the best interests of the child and not on its failure to hold any evidentiary hearing. Respondents would assert, however, that Missouri Court's failure to hold any evidentiary hearing at all, much less an evidentiary hearing on the best interests of the child, is further proof that Missouri Court had declined to exercise jurisdiction and/or its order granting physical custody to Petitioner was not entitled to full faith and credit.

> right is constitutionally permissible only if it is necessary to promote a compelling state interest and does so in the least restrictive manner possible.' Hence, consistent with [*Troxel v. Granville*, 530 U.S. 57 (2000)] acknowledgment that this right 'is perhaps the oldest of the fundamental liberty interests recognized by [the] Court,' we join those courts that have concluded the strict scrutiny test applies to statutes which infringe on the parent-child relationship." (Citations omitted)

A similar result was reached in *In re Custody of C.C.R.S.*, 892 P.2d 246 (Colo. 1995) and *In re Custody of C.M.*, 74 P.3d 342 (Colo.App. 2002). In *C.M.* the Court of Appeals held that Colorado's best interests standard when deciding custody issues between parents and nonparents "is subject to the presumption that biological parent has a first and prior right to custody. That presumption may be rebutted by evidence establishing the welfare of the child is better served by granting custody to a nonparent." *Id.* at 345. Because of these constitutional protections, when the trial court ultimately conducts a hearing on the best interests of the child, Petitioner's wishes as to custody and parenting time will be given presumptive effect. Contrary to Petitioner's assertions, Colorado recognizes a parent's presumptive right to be with their child.

Petitioner also mistakenly asserts that "The Colorado Supreme Court ruled that because Missouri did not apply Colorado substantive law, Missouri declined to exercise jurisdiction." (Petition for Writ of Certiorari pg. 22). In fact, the Colorado Supreme Court viewed Missouri law in light of whether or not Colorado was able to proceed to make a custody determination:

> "Missouri, like Colorado, has recognized that in certain situations, a failed adoption does not automatically result in the custody of a child being restored to the natural parent(s). . . . Indeed, Missouri, like Colorado, emphasizes that the overreaching goal in all adoption and custody proceedings is the best interests of the child. . . . Thus, we conclude that Missouri's law, like Colorado's, supports the proposition that custody determinations, even after a failed adoption, must take into account the best interests of the child." (Appendix to Petition for Writ of Certiorari pg. 23-26).

It could be argued, that the Colorado Supreme Court was commanding nothing more than what was contemplated by the Missouri Court. That a custody determination, based on the best interests of the child, must necessarily await another proceeding.[5] The issue then becomes what state is the appropriate forum for this determination. Respondents would assert that Colorado is the appropriate forum under Colorado, Missouri and Federal law as concluded by the Colorado Supreme Court. Respondents had standing to bring a custody action in Colorado. C.R.S. 14-10-123(1)(b) and (c). The child has resided in Colorado essentially all his life and therefore Colorado is the home state of the child; Respondents, individuals acting as parents of the child reside in Colorado; and essentially all information and evidence regarding the child's best interests is in Colorado.[6]

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[5] It should be noted that the alleged birth father had not participated or received notice of the Missouri action.

[6] Home state is determined by the "state which can best decide the case in the interest of the child." Home state is defined as the "[s]tate

(Continued on following page)

b. The Colorado Supreme Court's ruling allowing for a hearing on Respondents' request for custody of the minor child is not a failure to either enforce the Missouri Decree or an attempt at modifying the Missouri Decree in contravention of the PKPA.

As is noted above, it is not even a foregone conclusion that the Missouri Order constitutes a custody determination implicating the provisions of the PKPA. Irrespective of this, as is stated above, assuming the PKPA applies to this case and the Missouri Order constitutes a custody determination, because Missouri declined to exercise continuing jurisdiction over the custody determination, Colorado is not prohibited from entering a custody order and/or modifying Missouri's Order pursuant to 28 U.S.C. 1738A(f)(2).

c. The Colorado Supreme Court's ruling allowing for a hearing on Respondents' request for custody of the minor child is not a violation of the PKPA prohibition on the exercise of jurisdiction over a child custody dispute during the pendency of a proceeding in another state.

Petitioner asserts that Colorado's interpretation of 28 U.S.C. 1738A(f), like that of New Jersey's Supreme Court in *E.E.B.* encourages "as here, simultaneous litigation in two different states." (Emphasis omitted). (Petition for Writ

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immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as a parent, for at least six consecutive months, and in the case of a child less than six months old, the state in which the child lived from birth with any such persons." 28 U.S.C. 1738A.

of Certiorari pg. 23). Again, the Missouri Court "dismissed" the adoption action specifically finding that a determination on "custody must necessarily await another proceeding." As a result, there was no proceeding pending in Missouri and therefore there was not simultaneous proceedings. Nor is it of consequence that Respondents appealed the decision of the Missouri Court dismissing the adoption action. As aptly stated by the Colorado Supreme Court:

> "At the present time, there is an appeal pending in the Missouri Court of Appeals.[7] This appeal involves the dismissal of the Petitioner's Petition for Adoption. Specifically, the appeal addresses whether Mother's withdrawal of her consent to the adoption was valid. However, this appeal does not change the focus of our analysis. To the contrary, this appeal supports the notion that the failed adoption proceedings, to which we are according full faith and credit, are separate and distinct from the issue we address today, namely whether Colorado has jurisdiction to determine who should have custody of A.J.C. Stated differently, this is not a case where the Petitioners seek to re-litigate in Colorado the unfavorable result reached in the Missouri adoption proceedings. Rather, the Petitioners seek an independent custody determination that reflects the best interests of A.J.C." (Appendix to Petition for Writ of Certiorari pg. 15, n. 7).

[7] In fact, by the time the Colorado Supreme Court issued its opinion the Respondents had dropped their appeal in Missouri.

4. Whether the provisions of the Full Faith and Credit Clause of the United States Constitution are implicated in this case?

U.S. Const. Art. IV, Sect. 1, provides that states must give full faith and credit to the judicial determinations of other states. The PKPA is a codification of this constitutional provision in the context of child custody cases. However, "A state court judgment generally is not entitled to full faith and credit unless it satisfies the requirements of the Fourteenth Amendment's Due Process Clause." (Ginsberg, J., concurring in part and dissenting in part), *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 388 (1996) *citing Kreimer v. Chemical Constr. Co.*, 456 U.S. 461 (1982). The right of due process, at its essence is the right to be given notice and the opportunity to be heard. *LaChance v. Erickson*, 522 U.S. 262 (1988). Here, neither the minor child nor the Respondents were given an opportunity to be heard in a meaningful manner through an evidentiary hearing to determine the best interests of the child. *See When the Rules Don't Fit the Game* at 311 ("interest of a child caught in the middle may be independent of the interests of the biological parent."). Nor was the minor child and the Respondents provided an evidentiary hearing on their allegations that Petitioner had abandoned the child or that her mental condition was such that she was "unable to knowingly provide the child with the necessary care, custody and control" a parent is required to provide. These are grounds for involuntary termination in Missouri. Mo. Rev. Stat. 453.040. This being the case, Respondents would assert that the Missouri Order was not entitled to full faith and credit.

CONCLUSION

Respondents respectfully request that this Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted this 13th day of October, 2004.

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IN RE:

The Matter of:
Alexander Camp
VS.

No. JU. 103-180A

IN THE
CIRCUIT COURT
FAMILY COURT DIVISION
County of St. Charles,
Missouri

August 22, 2003

Judgment & Order

Cause called on birth mother's Motion to Withdraw her Consent to Termination of Parental Rights and Consent to Adoption.

Birth Mother, Colleen Camp Motion to Withdraw her Consent to Termination of Parental Rights is hereby granted

So Ordered

/s/ _____
Commissioner

/s/ Joseph R. Briscoe
Judge

8/22/03
Date

/s/ Colleen Camp
Colleen Camp ~~Attorney~~

/s/ Frances M. Weir 45938
Birth Mother's Attorney

_____
GAL/Juvenile Officer

SUPREME COURT, STATE OF COLORADO 2 E. 14th Avenue Denver, CO 80203 Original Proceeding Jefferson County District Court Case Number 03DR2893	% COURT USE ONLY %
In re: **The People of The State of Colorado** **In the Interest of:** **Minor Child** **DOB: 04/18/03** **Petitioners:** **G.A.L. and V.K.L** **And concerning** **Respondents:** **C.M.C. and D.C.**	Case Number: 04SA18
Eric A. Samler, #32349 For the Respondent C.M.C. Samler and Whitson, P.C. 1776 Lincoln Street, Suite 1010 Denver, Co 80203 303-670-0575 (phone) 303-670-0574 (fax) esamler@colorado-appeals.com Virginia L. Frank #33906 For the Respondent C.M.C. 35715 U.S. Highway 40 Suite 105-D Evergreen, CO 80439 (303) 670-4401 ginny@adoptionchoices.com	
RESPONSE TO ORDER TO SHOW CAUSE	

(Filed Jan. 30, 2004)

CONTENTS OF RESPONSE

FACTUAL BACKGROUND 3

I. THE MISSOURI COURTS HAVE PROPERLY EXERCISED CONTINUING JURISDICTION OVER THIS ADOPTION LITIGATION 9

(1) This litigation is essentially a continuation of an adoption proceeding that was filed in the Missouri courts 10

(2) Missouri courts exercised jurisdiction by entering orders for temporary placement, by assuming jurisdiction over the adoption petition, and by explicitly stating in its court orders that Missouri courts would retain jurisdiction 11

(3) Petitioners invoked the jurisdiction of the Missouri courts and consented to said jurisdiction 12

(4) The Interstate Compact of the Placement of Children (ICPC), and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), as applied to this case, establish jurisdiction in Missouri 12

(5) The Uniform Dissolution of Marriage Act does not apply to this case so as to deprive the Missouri courts of jurisdiction .. 14

II. THE JEFFERSON COUNTY DISTRICT COURT DID NOT ABUSE ITS DISCRETION, ACT OUTSIDE OF ITS JURISDICTION, OR TAKE ANY OTHER ACTION THAT WARRANTS ISSUANCE OF AN EXTRAORDINARY WRIT 19

(1) The Jefferson County District Court acted well within its discretion in declining to exercise any jurisdiction it may have had 19

(2) The trial judge's private telephone conference with the Missouri judge is not grounds for extraordinary relief..... 20

(3) The trial judge's refusal to hold an evidentiary hearing prior to dismissing the case is not grounds for extraordinary relief 23

(4) Petitioners' argument that the lack of formal registration under C.R.S. § 14-13-305 deprives Missouri of jurisdiction, or compels a different result in the district court, is without any sound basis in law.. 24

(5) The form of the District Court order in this case does not compel a different result and certainly does not justify issuance of an extraordinary writ 25

III. THE PETITIONERS HAVE FAILED TO SHOW THAT THEY HAVE NO ADEQUATE REMEDY AT LAW, AND ANY SUCH CLAIM MUST BE ADDRESSED TO THE MISSOURI COURTS 26

IV. THE MISSOURI COURT ORDER IS ENTITLED TO FULL FAITH AND CREDIT 26

V. PETITIONERS ARE NOT ENTITLED TO EXTRAORDINARY RELIEF BECAUSE THEY COME TO THIS COURT WITH "UNCLEAN HANDS."..... 29

CONCLUSION..... 33

Respondent C.M.C., by and through counsel Eric A. Samler and Virginia L. Frank, in response to the Order to Show Cause Issued herein, and pursuant to *In re Custody of K.R.*, 897 P.2d 896 (Colo. App. 1995), C.R.S. §§14-13-303, -203, and -206, U.S. Const. Art. IV Sec. I and *Marworth Inc v. McGuire,* 810 P.2d 653 (Colo. 1991), respectfully requests that this Court discharged the Order to Show Cause, and further requests that this Court remand this matter to the district court for the limited purpose of determining whether pursuant to C.R.,S. §14-13-312 Respondent C.M.C. is entitled to attorney fees and costs, and if so the amount to which she is entitled. In support thereof, Respondent C.M.C. states as follows:

FACTUAL BACKGROUND

On the date of the child's birth, the child's mother signed a document agreeing to temporarily transfer legal custody of her child to the Petitioners. The agreement provided that the child's mother may change her mind and take back physical custody of her child. If she did so, she would become obligated to reimburse the Petitioners in the amount of $20 per day for each day the child is with the Petitioners. The child's mother also signed a consent to termination of parental rights and consent to adoption. Pursuant to Missouri law, the consent to termination must be approved by the court and a parent may withdraw the consent at any time prior to the court's approval of the consent. Mo. St. 453.030(7).

Petitioners signed a document entitled Legally at Risk Placement acknowledging that the placement of the child is "legally at risk" until the parents' parental rights are terminated. The document further provides that in the

event termination of parental rights does not occur, they will return the child to the mother's intermediary. Petitioners filed with the Circuit Court for St. Charles County a Petition to Adopt the Minor Child and terminate mother's parental rights. Prior to the court accepting her consent to adoption and termination of parental rights, mother, as permitted by Missouri law, filed a motion to revoke her consent. The Circuit Court accepted her motion to revoke, dismissed the Petition for Adoption and awarded custody of the infant to his mother. Pursuant to Colorado law, an order dismissing an adoption proceeding and awarding custody of the child to his natural parent is a custody decree. *In re Custody* of K.R., *supra; IRM Dickson*, 983 P.2d 44 (Colo. App. 1998).

Immediately after the Missouri Court awarded custody of the child to his mother, Petitioners filed a Petition in Colorado for allocation of parental rights. While their Colorado Petition was pending, Petitioners filed with the Circuit Court for St. Charles County Missouri a motion to vacate the order granting physical custody of the minor child to the child's natural mother. That Motion was denied. Upon information and belief, the Missouri Court contacted the Jefferson County District Court, and advised the Court of the existence of the Missouri court orders awarding custody of the child to his natural mother. Subsequently the Jefferson County District Court declined to exercise jurisdiction, dismissed the Petition, and entered a writ of habeas corpus ordering Petitioners to return the child to his mother. The trial court further allowed the Petitioners 30 days to file any motion for post trial relief, including any motions to reconsider. Petitioners instead filed with this Court pursuant to C.A.R. 21 a Petition for Rule to Show Cause. In that Petition, Petitioners failed to provide this

Court with a complete chronology of the events that occurred in Missouri, and failed to provide the court with copies of all documents necessary for this Court to rule on the issues presented. In order to remedy this situation, a complete chronology of this case is provided below.

Attached in the Appendix filed with this Response are all documents filed in the Circuit Court for St. Charles County Missouri as well as all agreements entered into between the parties.

CHRONOLOGY OF EVENTS

1. On April 18, 2003, Respondent C.M.C. gave birth to Minor Child at St. John's Hospital in St. Louis Missouri.

2. Adoption proceedings were commenced by Petitioners in the Circuit Court of St. Charles County Missouri, Cause Number JU103-108A.

3. On April 19, 2003, Respondent C.M.C. signed a Transfer of Temporary Custody and Appointment of Power of Attorney for the care of the child in favor of Petitioners. The document was filed with Circuit Court of St. Charles County on April 21, 2003. (Exhibit A) The transfer provided that C.M.C. could change her mind prior to the court's acceptance of her consent to termination of parental rights and adoption, and that if she did change her mind, she would reimburse petitioners $20 per day for every day the child was with them.

4. On April 21, 2003, Respondent C.M.C. signed a Consent to Termination of Parental Rights and Consent to Adoption which was filed with the Circuit Court of St. Charles County, Missouri on April 21, 2003. (Exhibit B)

5. On April 21, 2003, Petitioners filed in the Circuit Court for St. Charles County, Missouri, both a Petition for Termination of Parental Rights and Transfer of Legal Custody and Petition for Adoption and a Motion for an Emergency Order of Transfer of Legal Custody. (Exhibits C and D)

6. On April 21, 2003, the Circuit Court of St. Charles County signed an Order Placing the Minor Child with the Prospective Adoptive Parents upon Signing of Order. Pursuant to the terms of the Order, the Circuit Court of St. Charles County stated that it "retains jurisdiction in this matter for a formal hearing of termination of parental rights, transfer of legal custody and petition for adoption." (Exhibit E)

7. On or about April 21, 2003, Petitioners signed a document entitled "Legally at Risk Placement." A copy of that document is included in the Appendix as Exhibit F. Pursuant to the terms of the document, the Petitioners acknowledged that the placement of the child with them was legally at risk until termination of parental rights occurred. They further agreed that "[i]n the event that termination of parental rights does not occur, than prospective adoptive parents agree to return the child to the intermediary." This document was filed with the Circuit Court on April 21, 2003.

8. On May 15, 2003, the Circuit Court entered an Order stating that "the Consent to Termination of Parental Rights and Consent to Adoption executed by the birth mother . . . is not approved." (Exhibit G)

9. On July 25, 2003 Respondent, in accordance with Mo. Rev. Stat. §453.030(7), which provides that consent to termination and adoption may be withdrawn anytime

prior to the consent being accepted by the Court, filed a Motion to Withdraw and Revoke Consent to Adoption. (Exhibit H)

10. On August 22, 2003, the Circuit Court of St. Charles County entered a Judgment and Order granting Respondent's motion to withdraw consent to termination of parental rights and consent to adoption. (Exhibit I)

11. On September 10, 2003, Respondent filed a Response to the Petition for Adoption filed by Petitioners. (Exhibit J)

12. On September 26, 2003, Respondent filed a Motion to Dismiss the Petition for Adoption requesting that the adoption proceedings be dismissed and custody of the minor child be returned to her. In Support of that Motion they filed a memorandum of law. (Exhibits K and L)

13. On October 15, 2003, the Circuit Court issued a Judgment of Dismissal of Petition for Adoption granting Respondent's motion for dismissal and ordering that physical custody of the minor child be returned to the natural mother. (Exhibit M) Pursuant to Colorado Law, this order is a custody decree. *In re Custody of KR.*, 897 P.2d 896 (Colo. App. 1995).

14. On November 3, 2003, Petitioners filed with Circuit Court For St. Charles County a Motion to Vacate Judgment. (Exhibit N)

15. On December 5, 2003, a hearing was held on Petitioner's Motion to Vacate and on January 2, 2004, the Circuit Court for St. Charles County denied the Motion to Vacate Judgment finding that consent to terminate had been withdrawn and further finding that the Respondent did not abandon the child. The finding that Respondent did not abandon her child was based upon the Transfer of

Temporary Custody and Appointment of Power of Attorney document executed by Respondent (Exhibit "A"), which specifically provides that Respondent may change her mind and wish to take back physical custody of her child and further provides that if she does so, she will reimburse Petitioners in the amount of $20 for every day the child is in their care. (Exhibit P)

16. Petitioners filed a Notice of Appeal with the Missouri Court of Appeals and filed with the Circuit Court a Motion to Set Supersedeas Bond. (Exhibits Q) Mother filed an objection to the Motion. (Exhibit R) The Motion to set Supersedeas Bond was denied.

17. On October 31, 2003, two weeks after the Circuit Court for St. Charles County, Missouri had ordered that physical custody of the minor child be returned to Respondent, and four days before the Petitioners filed in Missouri a Motion to Vacate the Order awarding Respondent Custody, Petitioners filed in the District Court Jefferson County, Colorado, a Verified Petition for Allocation of Parental Responsibilities. (Exhibit S) The Petitioners failed to attach to their pleading all pleadings and relevant documents filed with the Circuit Court for St. Charles County, Missouri, thus presenting to the District Court an incomplete picture of what transpired in Missouri.

18. On November 3, 2003, Respondent filed in the Jefferson County District Court a Petition for Writ of Habeas Corpus, requesting that the child immediately be returned to Respondent. (Exhibit T)

19. On December 3, 2003, Respondent filed an Answer to the Verified Petition and filed a Motion to Dismiss the Petition. (Exhibits U and V)

20. On December 23, 2003, Petitioners filed a Motion for Extension of Time to Respond to Petition for Writ of Habeas Corpus. (Exhibit W)

21. On January 3, 2003, the District Court for Jefferson County entered a Writ of Habeas Corpus Ordering Petitioners to immediately return the minor child to Respondent or her representative. On that same day, the District Court entered an order *nunc pro tunc* to December 4, 2003, dismissed Petitioner's Verified Petition for Allocation of Parental Responsibilities, finding that the Circuit Court for Missouri had previously entered an order awarding Respondent custody of the minor child and because Missouri retained continuing and exclusive jurisdiction over the matter, the District Court did not have jurisdiction in this matter. (Exhibits X and Y.)

22. On January 8, 2003, the Petitioners filed a Response to the Motion to Dismiss and Petition for Writ of Habeas Corpus or in the Alternative for Post-Trial Relief. Petitioners did not present in that Response/Motion any factual or legal arguments. (Exhibit Z)

23. On January 13, 2003, the District Court entered an Order reaffirming its prior rulings and denying Petitioner's request that it reconsider its granting of the Writ of Habeas Corpus and dismissing the Petition for Allocation of Parental Rights. The District Court granted Petitioners 30 days to file any motions to reconsider or for post-trial relief (Exhibit AA)

24. Petitioners then filed with this Court a C.A.R. 21 Petition. Attached to that Petition were eleven of the 27 documents attached to this Response.

I. THE MISSOURI COURTS HAVE PROPERLY EXERCISED CONTINUING JURISDICTION OVER THIS ADOPTION LITIGATION.

In their Verified Petition for Allocation of Parental Rights, Petitioners allege that no other state has jurisdiction over this matter. *See* Exhibit S p. 2, para. 2. This allegation is patently false. Missouri courts have jurisdiction over this matter, for at least the following reasons: (1) This litigation is essentially a continuation of an adoption proceeding that was filed in the Missouri courts, (2) Missouri courts exercised jurisdiction by entering orders for temporary placement, by assuming jurisdiction over the adoption petition, and by explicitly stating in its court orders that Missouri courts would retain jurisdiction, (3) Petitioners invoked the jurisdiction of the Missouri courts and consented to said jurisdiction – at least until they were unsuccessful in getting the result they wanted, (4) the Interstate Compact of the Placement of Children (ICPC) and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), applied to this case, establish jurisdiction in Missouri, and (5) the Uniform Dissolution of Marriage Act does not apply to this case so as to deprive the Missouri courts of jurisdiction and, in fact, supports the actions of the Jefferson County District Court in this case.

(1) This litigation is essentially a continuation of an adoption proceeding that was filed in the Missouri courts.

The actions in Missouri and Colorado are essentially the same: the parties are the same, the minor child is the same, and the relief requested is almost the same. In Missouri, the petitioners asked the courts to terminate the

parental rights of the child's mother and father, and to give Petitioners custody of the child; in Colorado, they drop their request to terminate the natural parents' rights, but continue to press for custody of the child. There is no material difference in the parties or the relief requested. The only difference is that the petitioners lost there and hoped they would prevail here, and they have found some additional grounds in the Colorado statute that they hope to apply to the litigation they already lost in Missouri.

Colorado Courts have stated on more than one occasion that ***adoption proceedings are custody proceedings.*** *In re Marriage of Dickson*, 983 P.2d 44 (Colo. App. 1998) ("[A] claim for nullification of adoption is in the nature of a custody proceeding."); *In re Custody of K.R.*, 897 P.2d 896 (Colo. App. 1995). Prior to filing of the Petition for Allocation of Parental Responsibilities in the Jefferson County District Court, the Circuit Court for St. Charles County, Missouri had dismissed Petitioners' Petition for Adoption and had awarded custody of the child to Respondent. Missouri had already made a final custody determination. Pursuant to *Marworth Inc v. McGuire,* 810 P.2d 653 (Colo. 1991), a final judgment of one state must be given full faith and credit in every other state. *See* U.S. Const. Art. IV Sec. I. *(cited with approval in IRM Dickson, supra.)* This fundamental constitutional principle is reflected in C.R.S. §14-13-203, which states that a court of this state may not modify a custody determination of another state unless the court has jurisdiction to enter an initial custody determination **and** the other state no longer has jurisdiction or has declined to exercise that jurisdiction. Missouri has jurisdiction over this matter and has continued to exercise that jurisdiction.

(2) Missouri courts exercised jurisdiction by entering orders for temporary placement, by assuming jurisdiction over the adoption petition, and by explicitly stating in its court orders that Missouri courts would retain jurisdiction.

On April 21, 2003, Missouri entered an order granting temporary custody of the child to Petitioners. (Exhibit E) In that order, the court specifically provided that it was retaining jurisdiction over this matter. On October 15, 2003, Missouri entered an order dismissing the petition for adoption and restored custody of the child to the Respondent (Exhibit L). On January 2, 2004, the Missouri Court denied Petitioners' motion to vacate its prior order this reaffirming its prior custody order. (Exhibit P) As these documents demonstrate, Missouri has exercised jurisdiction in this matter as recently as four weeks ago. Jurisdiction was proper in Missouri when the adoption proceeding was commenced by Petitioners, and pursuant to both the Missouri court orders, and the Interstate Compact on the Placement of Children, *see discussion, infra,* which has been adopted both by Colorado and Missouri, jurisdiction over the child remained with Missouri until such time as the adoption was finalized or the child reaches the age of eighteen. Missouri therefore had jurisdiction to enter the order restoring custody to the natural mother.

(3) Petitioners invoked the jurisdiction of the Missouri courts and consented to said jurisdiction.

Petitioners are estopped from arguing that the Missouri courts do not have jurisdiction over the adoption litigation. Although Petitioners do not acknowledge it, they were the ones who initiated the adoption proceedings

in Missouri and thus invoked the jurisdiction of the Missouri Courts. Now they are trying to "un-invoke" that jurisdiction. They simply cannot do that. Once they availed themselves of Missouri's jurisdiction in order to obtain temporary custody of the child, they agreed to abide by the Missouri Court's Orders, including the provision in the temporary custody order that stated in no uncertain terms that the Circuit Court for St. Charles County, Missouri retained jurisdiction over the matter. They cannot now complain that the court that temporarily placed the child with them and specifically retained jurisdiction, lost jurisdiction once the Petitioners removed the child from the state.

(4) The Interstate Compact of the Placement of Children (ICPC), and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), as applied to this case, establish jurisdiction in Missouri.

Colorado has joined the Interstate Compact of the Placement of Children (ICPC), which states in no uncertain terms in Article I:

> It is the purpose and policy of the party states to cooperate with each other in the interstate placement of children to the end that: (d) appropriate jurisdictional arrangements for the care of the children will be promoted.

C.R.S. §24-60-1802, Art. I. Under Article V of the Compact,

> The sending agency shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment and disposition of the child which it would have had if the child had remained in the sending

> agency's state, until the child is adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state. Such jurisdiction shall also include the power to effect or cause the return of the child or its transfer to another location and custody pursuant to law.

See Department of Social Services of City and County of Denver v. District Court of the Eighteenth Judicial Dist., 742 P.2d 339, 342 (Colo 1987)(The language of the Interstate Compact clearly states that the sending agency retains jurisdiction until the child is adopted.) A "sending agency" is defined in § 24-60-1802 Art. II (d) as

> a party state, officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a court of a party state; a person, corporation, association, charitable agency, or other entity which sends, brings, or causes to be sent or brought any child to another party state.

The majority of states that have addressed the issue have concluded that "sending agency" includes the natural parent. *In re Adoption No. 10087 in Circuit Court for Montgomery County,* 597 A.2d 456, 461-462 (Md. 1991); *In re Baby Girl,* 850 SW. 2d 64 (Mo. 1993); *In re Adoption of C.L.W.,* 467 So.2d 1106 (Fla.App.2 Dist 1985); *In re Adoption of T..M.M,* 186 Mont. 460, 608 P.2d 130, 132 (1980); *In the Matter of the Adoption of Baby Boy M.G.,* 135 Misc.2d 252, 515 N.Y.S.2d 198, 199-200 (N.Y. Sur.1987); *In the Matter of the Adoption of Calynn, M. G.,* 137 Misc.2d 1005, 523 N.Y.S.2d 729, 730-731 (N.Y. Sur.1987); *Matter of Adoption of A.M.M.,* 949 P.2d 1155 (Kan. App. 1997).

Under the ICPC, Missouri retains jurisdiction over the child until such time as the child is adopted. Missouri

therefore had jurisdiction to enter the order granting custody and pursuant to C.R.S. § 14-10-13-303, the District Court had a duty to accept that decree as binding.

(5) The Uniform Dissolution of Marriage Act does not apply to this case so as to deprive the Missouri courts of jurisdiction.

Petitioners claim that Section 123 of the Uniform Dissolution of Marriage Act gives Colorado jurisdiction over this adoption litigation and requires this Court to issue its extraordinary writ and order the district court to assert jurisdiction over this case. Petitioners' reliance upon C.R.S. § 14-10-123(1) is misplaced. While C.R.S.§ 14-10-123 provides that the district court has subject matter jurisdiction over petitions for allocation of parental responsibilities, it does not address the situation where a foreign state has already entered a custody order in an adoption case, prior to the filing in Colorado of a petition for allocation of parental responsibilities. Nor does it address the situation where the child is in Colorado pursuant to the Interstate Compact of the Placement of Children (ICPC). In that situation, C.R.S. §14-10-123(1) must be read in conjunction with both the jurisdictional requirements of the UCCJEA (C.R.S. §14-13-101 et seq.) as well as the jurisdictional requirements of the ICPC (C.R.S. §24-60-1801 et seq.).

Adoption proceedings of foreign states that determine custody of the minor child are custody decrees to which UCCJEA applies. *In re Custody of K.R., supra.* A foreign court order dismissing a petition for adoption and providing that custody be returned to the biological mother is a custody determination. *See* §14-13-303. As a result the

courts of this state are required to enforce that decree unless a court of this state has jurisdiction to modify that decree. The Jefferson County District Court did not have jurisdiction to modify the Missouri decree and therefore acted properly in dismissing the petition, and ordering that the child be returned to his mother.

Petitioners' reliance on *In the Matter of Custody of C. C.R.S.*, 892 P.2d 246 (Colo. 1995) is misplaced. *C.C.R.S.* addressed the rights of prospective adoptive parents and the birth mother, however, both parties in that case resided in Colorado and, moreover, there had been no prior adjudication regarding custody. The Court held that prospective adoptive parents had standing in a custody dispute concerning the child. The issue here is not whether the Petitioners have standing, but rather, whether under the circumstances of this case, a Colorado District Court should exercise jurisdiction over the custody dispute. *See In re Marriage of Tonnessen,* 937 P.2d 863 (Colo App. 1996)("The question whether jurisdiction exists is distinct from the question whether jurisdiction should be exercised. *McCarron v. District Court,* 671 P.2d 953 (Colo.1983); *Johnson v. District Court,* 654 P.2d 827 (Colo.1982)."). As the Colorado Court of Appeals has explained,

> Subject matter jurisdiction concerns the court's authority to deal with the class of cases in which it renders judgment. *In re Marriage of Stroud,* 631 P.2d 168, 170-71 (Colo.1981). A court has jurisdiction of the subject matter if the case is one of the types of cases that the court has been empowered to entertain by the sovereign from which the court derives its authority. *Paine, Webber, Jackson & Curtis, Inc. v. Adams,* 718 P.2d 508 (Colo.1986); *Williamson v. Williamson,* 39

> P.3d 1199 (Colo.App.2001). However, it is not sufficient that the court has, in the abstract, the authority to decide the particular class of case that is before it. The court's authority must be properly invoked before it can act. *In re Marriage of Stroud, supra.*

In re Marriage of Orr, 36 P.3d 194 (Colo. App. 2001).

The issue before this Court is not whether Petitioners have standing or whether the best interest of the child standard should apply. The issue is whether the district court had jurisdiction, and if it did have jurisdiction, whether it abused its discretion in deciding not to exercise the jurisdiction it might have. *See L.G. v. People*, 890 P.2d 647 (Colo. 1995). A Court must apply a two-part test in determining if jurisdiction exists. The first question is whether the court does have jurisdiction. If it is determined that the court does have jurisdiction, the court must then determine if it should exercise that jurisdiction. The burden of proof is on the party claiming jurisdiction. *See Clark v. Kendrick,* 670 P.2d 32 (Colo. App. 1983). The issue of jurisdiction can be decided solely on the pleadings. *Id.*

The Petitioners argue that the fact that an adoption action was filed in Missouri prior to the filing of the Petition for Allocation of Parental Rights in Colorado is of no weight. They contend that because Colorado is the child's home state, then pursuant to C.R.S. §14-13-201, Colorado has jurisdiction to make an initial custody jurisdiction. (Petition at p. 7) What this argument ignores, however, is that an initial custody determination has already been made. *(See* Exhibits M and P). The applicable provision, therefore, is C.R.S. §14-13-203, and because Missouri has retained jurisdiction over this matter, and because the Petitioners have invoked the jurisdiction of

that state, Colorado does not have jurisdiction to modify the Missouri custody decree.

The Petitioners argue that because C.R.S. § 14-13-103 states that the UCCJEA does not apply to adoption proceedings, therefore the order entered by the Missouri Court dismissing the adoption proceeding and awarding custody of the child to Respondent is not a custody order, and therefore jurisdiction is proper in Colorado. The question is not whether the UCCJEA applies to the Missouri proceeding, rather, the question is whether the act applies to the Petition for Allocation of Parental Rights filed by Petitioners in the Jefferson County District Court. The action filed by the Petitioners is neither an adoption proceeding nor is it an "proceeding pertaining to the authorization of emergency medical care for the child." Therefore C.R.S. § 14-13-103 is inapplicable. The action filed by the Petitioners is a child custody proceeding as that term is defined in C.R.S. §14-13-102(4). The UCCJEA is applicable. While arguably the UCCJEA does not apply to the Missouri proceeding, the ICPC certainly does, and pursuant to Article V of the Compact, Missouri has jurisdiction.

The Petitioners argue that even if the UCCJEA does apply, this Court is free to ignore the provisions of that act because Missouri does not have jurisdiction of the child under the act and therefore the Missouri order is not deserving of full faith and credit. This "doublespeak" simply confuses the issues. As stated above, the Missouri proceeding is governed by the provisions of the ICPC and the Colorado proceeding is governed by the UCCJEA. When this is done, there is no conflict as to which state has jurisdiction – Missouri has jurisdiction under the ICPC and Colorado does not have jurisdiction under the

UCCJEA. This is not a case where there are competing adoption proceedings – there was but one adoption proceeding and that was filed in Missouri.

The facts of *In re the Custody of K.R., supra,* are identical to the facts of this case. In that case, a petition for adoption had been filed in California by prospective adoptive parents who were residents of Colorado. The birth mother withdrew her consent to the adoption and the California Court dismissed the adoption petition and awarded custody of the child to the birth mother. Prospective adoptive parents then filed a petition for custody in the Colorado Courts.

The Colorado District Court dismissed the petition finding that it lacked jurisdiction. The Court of Appeals affirmed that dismissal. The Court rejected the prospective adoptive parent's argument that the California order that dismissed the adoption proceeding was not a custody decree. *K.R.*, 897 P.2d at 899. The Court found that *C.C.R.S., supra,* is not controlling as it did not address the issues presented. *K.R.* 897 P.2d at 900. In *G.B. v. Arapahoe County Court,* 890 P.2d 1153 (Colo. 1995), this Court defined a custody determination as "a court order providing for the custody of a child." *G.B. v. Arapahoe County Court,* 890 P.2d at 1157. Relying upon that definition, the Court held that because the California order "provided that the custody of the child be returned to the biological mother," it was a custody determination, and therefore the provision of the UCCJEA did apply. *K.R.*, 897 P.2d at 900. Because the UCCJEA applied, Colorado could not modify the California Custody Decree unless California had lost or declined to exercise jurisdiction over the matter. The current version of the UCCJEA in effect in Colorado reaffirms the Court of Appeals' holding in *K.R.* C.R.S. §14-13-203 limits

the jurisdiction of Colorado Courts to modify a custody determination of another state to situations where the foreign jurisdiction "no longer has exclusive, continuing jurisdiction under a provision of law adopted by that state that is in substantial conformity with section 14-13-202 . . . or the child, the child's parents and any person acting as a parent do not presently reside in the other state."

The Missouri Court order provides that the Missouri Court "retains jurisdiction in this matter for a formal hearing of termination of parental rights, transfer of legal custody and petition for adoption." (Exhibit E). Furthermore, the child's parents continue to reside in Missouri.

Therefore, under *In re Custody of K.R.*, the Missouri order dismissing the adoption and awarding custody to Respondent is a custody decree, and pursuant to C.R.S. §14-13-203 and 14-13-303, the Colorado Courts do not have jurisdiction to modify the decree and are further under an obligation to enforce that decree.

II. THE JEFFERSON COUNTY DISTRICT COURT DID NOT ABUSE ITS DISCRETION, ACT OUTSIDE OF ITS JURISDICTION, OR TAKE ANY OTHER ACTION THAT WARRANTS ISSUANCE OF AN EXTRAORDINARY WRIT.

Notwithstanding the arguments herein that Missouri, not Colorado, has exclusive jurisdiction over this dispute, Respondents offers another reason that this Court should reject the Petitioners' request for extraordinary relief under C.A.R. 21: the rulings and actions of the Jefferson County Court were well within its discretion and not grounds for this Court's intervention on an extraordinary writ. Petitioners make a variety of allegations of error by

the Jefferson County District Court, and none of those allegations have merit. Contrary to the Petitioners' contention, the trial court did not abuse its discretion in dismissing their Petition and in ordering that the Missouri Court Order be given full faith and credit and that the Petitioners immediately return the child to Respondent or her intermediary.

1. The Jefferson County District Court acted well within its discretion in declining to exercise any jurisdiction it may have had.

Even if this Court were to rule that the Jefferson County District Court had jurisdiction, that would not automatically entitle the Petitioners to relief. It was within the trial court's discretion not to exercise its jurisdiction. *See L. G. v. People,* 890 P.2d 647 (Colo. 1995)(Even if court does have jurisdiction, it must determine whether it should exercise that jurisdiction.) To prevail, Petitioners must show that not only *could* the district court take the case, but that it had to do so. Because the trial court did not exceed its jurisdiction in dismissing the petition, the issue before this Court is whether the trial court abused its discretion. A trial court abuses its discretion only when its ruling is manifestly arbitrary or unreasonable. *See Boettcher & Co., Inc. v. Munson,* 854 P.2d 199, 211 (Colo.1993). The trial court's decision here was neither.

Petitioners' reliance on *Pearson v. District Court*, 924 P.2d 512 (Colo. 1996) is misplaced. At issue in *Pearson* was whether a particular statute precluded the trial court from ruling as it did. Therefore the issue was not whether the trial court abused its discretion but whether the trial court exceeded its authority. Here, Petitioners point to no statute that the district court violated, and they show no

abuse of discretion. The Jefferson County District Court was not manifestly arbitrary or unreasonable in rejecting the Petitioners' attempts to persuade it to alter a Missouri Court order.

2. The trial judge's private telephone conference with the Missouri judge is not grounds for extraordinary relief.

Petitioners want this Court to rule that, when the Jefferson County District Judge accepted the telephone call from the Missouri Judge and learned of the existence of a Missouri Court order, the Jefferson County District Judge did something that warrants issuance of an extraordinary writ. However, the district judge acted well within his authority under Subsection (3) of Section 110 of the UCCJEA, C.R.S. §14-13-110(3). Communication between courts about court records may occur without informing the parties. Section 110 provides:

> (1) A court of this state may communicate with a court in another state concerning a proceeding arising under this article.
>
> (2) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.
>
> **(3) Communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of the communication.**

> (4) Except as otherwise provided in subsection (3) of this section, a record must be made of a communication under this section. The parties must be informed promptly of the communication and granted access to the record.
>
> (5) For the purposes of this section, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

C.R.S. §14-13-110 (emphasis added). Because the communication was limited to whether in fact the Missouri Court had entered an order dismissing the Missouri Petition for Adoption and awarding custody to Respondent-mother, the telephone conversation was governed by Subsection (3). The Jefferson County District Judge was under no obligation to permit any parties to participate in the telephone conversation; nor was he obligated to make a record of the communication. Petitioners had no right to present facts and legal arguments. Only if the communication involved substantive matters would C.R.S. 14-13-110(2) be implicated. *See In re Simons,* 693 N.E.2d 1111, 1118 (Ohio App. 2 Dist. 1997) ("communications regarding the status of other pending cases are essential to the fulfillment of the purposes of the UCCJA . . . . . where there is no evidence that the trial judges exchanged evidence or conducted communications regarding the substantive issues of the pending cases, we cannot say there is a violation of any party's due process rights.). Petitioners herein have not alleged or submitted any supporting affidavits in this Court that allege that the two judges discussed anything other than material covered by Subsection (3). There is no basis for this Court to issue its writ because of the Missouri judge's telephone call to the Jefferson County District Court judge.

Nor do Petitioners state a claim under Subsection (2) of Section 110. Subsection (2) does not forbid private telephone calls between judges; it provides permissive authority for a district judge, within exercise of his discretion, to permit or to not permit parties to participate in a telephone call, even when the telephone conversation involves matters not covered in Subsection (3). Therefore, even if Petitioners had claimed or proven that the conversation covered matters other than those identified in Subsection (3), there is no automatic statutory right to have participated in such telephone conversations. When judges discuss matters not covered by Subsection (3), there are only three further requirements: making of a record of the communication, informing the parties, and permitting the parties to "present facts and legal arguments before a decision on jurisdiction is made." C.R.S. § 14-13-110(2).

Even if Petitioners had alleged and proven a violation of Section 110 of the UCCJEA, they still do not establish grounds for extraordinary relief, because they are not prejudiced by any technical omission and any error was harmless. As argued, *supra,* the Missouri courts have jurisdiction over this matter, and the Jefferson County district judge was well within his discretion to decline to intervene in the orders and procedures of the Missouri court system. The Petitioners presented whatever facts and legal arguments they wished to present to the district court in their Motion to Reconsider, and they have presented those "facts" and legal arguments in their petition in this Court. Further, the district court gave Petitioners thirty additional days to present anything else they wished, and they elected to not do so.

3. The trial judge's refusal to hold an evidentiary hearing prior to dismissing the case is not grounds for extraordinary relief.

Petitioners offer two reasons that this Court should issue its writ based upon the refusal of the Jefferson County District Court to hold a hearing before dismissing their Petition. They claim that his actions violate C.R.S. § 14-13-110(2), *see* discussion, *supra,* and they claim that his actions violate their "due process" rights. Petitioners are wrong because (1) C.R.S. § 14-13-110(2) does not require an evidentiary hearing, and (2) they have no due process right to continue to keep the child from his mother.

Regarding Petitioners' claims under C.R.S. § 14-13-110(2), the above analysis about the telephone call also applies to their desire for an evidentiary hearing. They can show no prejudice whatsoever, as their claim to exclusive jurisdiction in Colorado has no merit whatsoever. Even if the court did err in not providing opportunity for party to present facts and legal argument, Petitioners must show that they were harmed by this procedural error. *See In re Custody A.N.W.,* 798 N.E.2d 556 (Ind. App. 2003). Petitioners have failed to show that the trial court's ruling would have been different if they had been provided the opportunity to make legal arguments and present facts. The pleadings on file in this matter speak for themselves, and from those pleadings it is clear that Missouri has retained jurisdiction over this matter.

Further, Subsection (2) does not require an evidentiary hearing, it requires only an opportunity to present facts and legal arguments *when matters other than those covered by Subsection (3)* are discussed by judges on the telephone. Petitioners provided to the district court their "facts and legal arguments," in the form of their Motion for

Reconsideration, and they have presented those same facts and arguments here.

As for the Petitioners' vague due process claim, it is addressed in this Response, *infra,* in the discussion of Full Faith and Credit.

It is apparent from a review of all the relevant material that the Petitioners are not only wrong about jurisdiction, they are attempting to abuse court process to avoid lawful orders entered by the Missouri courts, and to avoid their own contractual agreements. The Petitioners are wrong about their underlying claims, and this Court should not delay return of the child to its mother one day longer based on the specious claim that there should be further hearings in the Colorado courts.

4. Petitioners' argument that the lack of formal registration under § 14-13-305 deprives Missouri of jurisdiction, or compels a different result in the district court, is without any sound basis in law, because they had full notice of the relevant court orders and fully participated in the litigation that resulted in the orders.

Petitioners further argue that the failure of Respondent to perfect registration of the Missouri Custody Decree prevents her from enforcing that decree. A review of the registration provisions in C.R.S. §14-13-305 demonstrates that the registration "requirements" were intended to apply to a situation where a party who was awarded custody in a foreign state sought by a separate action to enforce that decree. This is not what happened here. Almost immediately after the custody decree was entered by the Missouri Court, with full participation by the

Petitioners, the Petitioners filed a proceeding in the Jefferson County District Court requesting that the court either ignore that decree or modify it. The Petitioners had notice of the decree, and by initiating the proceedings in this State, were contesting the validity of that decree. Thus the purpose of the procedures set forth in C.R.S.§ 14-13-305 have been met, and Petitioners' objection to the form of the writ, and the failure to register the foreign decree elevates form over substance. *See Frohlick Crane Service v. Mack,* 182 Colo. 34, 37, 510 P.2d 891, 892 (1973) (If a definition elevates form over substance thus overriding clear legislative intent, it will not be followed). Further, petitioners here are the same as in Missouri. They not only had full notice of the Missouri court orders, they participated fully in the litigation there.

5. The form of the District Court order in this case does not compel a different result and certainly does not justify issuance of an extraordinary writ.

Petitioners argue that because Writs of Habeas Corpus have been abolished, the district court was without power to enter a writ ordering the return of the child. In *In re People ex rel. B.C.,* 981 P.2d 145, 149 (Colo. 1999) this Court held that "Rule 106 only abolished the remedial writs in the sense that it abolished the technical pleading requirements of the writs that existed before the rule was promulgated." C.R.C.P. 106 is not to be read so as to "abrogate the authority vested in district courts, previously under the common law and currently by statute, to grant [the appropriate] writ." *Id. See also People ex rel. Mijares v. Kniss,* 144 Colo, 551, 553, 357 P.2d 352, 353 (1960):

> '[e]ven under the Rules of Civil Procedure the ***substantive aspects*** of remedial writs are preserved, and relief of the same nature as was formerly provided in such proceedings may be granted in accordance with precedents established under the old practice.' (Emphasis supplied.) *Leonhart v. District Court,* 138 Colo. 1, 329 P.2d 781, 783; *Hall v. City and County of Denver,* 117 Colo. 508, 190 P.2d 122; *North Poudre Irr. Co. v. Hinderlider,* 112 Colo. 467, 150 P.2d 304.

C.R.S. §14-13-303(1) requires that "a court of this state . . . recognize and enforce a child custody determination of another state." C.R.S. §14-13-303(2) provides that "a court of this state may utilize any remedy available under other law of this state to enforce a child custody determination of another state." Because the "substantive aspects" of remedial writs have not been abolished, it was not improper for the district court enter a writ of habeas corpus ordering Petitioners to immediately return the child to Respondent or her intermediary.

III. THE PETITIONERS HAVE FAILED TO SHOW THAT THEY HAVE NO ADEQUATE REMEDY AT LAW, AND ANY SUCH CLAIM MUST BE ADDRESSED TO THE MISSOURI COURTS.

Petitioners' final contention is that they cannot obtain appropriate relief through the appellate process. In essence their argument is that if the Missouri Court Order is given full faith and credit and properly enforced, it would result in the child being removed from them, thus causing them irreparable harm. The problem with this argument, to the extent they make it, is that they have not raised in the Missouri courts the claim that Missouri has no jurisdiction.

They have rights to process and appeals in Missouri and, indeed, have availed themselves of those procedures. They fail to show any inadequate remedy at law.

IV. THE MISSOURI COURT ORDER IS ENTITLED TO FULL FAITH AND CREDIT.

Missouri had already made an initial custody determination. Pursuant to U.S. Const. Art. IV Sec. 1, a final judgment of one state must be given full faith and credit in every other state. *See Marworth Inc v. McGuire,* 810 P.2d 653 (Colo. 1991); *IRM Dickson, supra.* This fundamental constitutional principle is reflected in C.R.S. § 14-13-203. The manipulative behavior of the Petitioners in this case is a textbook illustration of the importance of the principles underlying the Full Faith and Credit Clause.

A hearing was held in Missouri prior to the dismissal of the Petition for Adoption and the entry of judgment awarding custody of the child to the Respondent. Under Missouri law, in an adoption proceeding, consent of the natural parent is jurisdictional, and if the natural parent objects to the adoption and if willful abandonment or neglect is not proven, the court will not reach the question of whether the adoptive parents are fit or what is in the best interest of the child. *See In re M.F.,* 1 S.W.3d 524 (Mo. App. W.D. 1999); *In Re Adoption of K.A.S.*, 933 S.W.2d 942 (Mo. App. W.D. 1996). After hearing arguments of counsel, and after allowing the parties to brief the issues, the court entered a ruling finding that the consent to terminate parental rights was revoked and that Respondent had not abandoned the child. Thus contrary to the Petitioners' claim, they were afforded a hearing in Missouri, and the court simply ruled against them.

Petitioners' argument that the Courts of this State are not obligated to give full faith and credit to the Missouri Court order because they have been deprived of "due process of law," is unavailing, and is simply an attempt to circumvent a valid court order from another state. While the 14th Amendment and Colo. Const. Art. II §25 provide protection against arbitrary governmental infringements and restrictions on liberty interests,[1] neither constitutional provision is implicated if the party does not have a constitutionally-protected liberty interest. *Watso v. Colorado Department of Social Services*, 841 P.2d 299 (Colo. 1992); *People in the Interest of A.M.D.*, 648 P.2d 625 (Colo. 1982); *People in the Interest of A.W.R.*, 17 P.3d 192 (Colo. App. 2000). In the context of foster parents, the Court of Appeals has held that in determining if a constitutionally-protected liberty interest exists, the question is whether the foster parents have a realistic expectation of the continuation of the foster-parent/foster-child relationship. Because no realistic expectation existed, there is no constitutionally-protected liberty interest and the Petitioners are not entitled to the procedural protection of the due process clause of the federal or state constitution. *People in the interest of A.W.R., supra.*

The Petitioners voluntarily signed a document acknowledging that the placement of the child with them was "legally at risk," and further agreeing that in "the event that termination of parental rights does not occur, [they] agree to return the child to the intermediary." (Exhibit F) Until such time as the termination of Respondent's parental rights occurred, Petitioners had no realistic

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[1] *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Watso v. Colorado Department of Social Services*, 841 P.2d 299 (Colo. 1992).

expectation of the continuation of that relationship. In addition, the Transfer of Temporary Custody document signed by Respondent stated that Respondent may change her mind regarding the transfer of custody of her child prior to her consent to termination of parental rights and adoption being accepted by the court.

The majority of courts have found that foster parents do not have a protected liberty interest, *Rodriguez v. McLaughlin,* 214 F.3d 328 (2nd Cir. 2000), *cert. denied,* 532 U.S. 1051 (2001) (prior to finalization of adoption no liberty interest exists); *Procopio v. Johnson,* 994 F.2d 325 (7th Cir. 1993) (no liberty interest); *Renfro v. Cuyahoga County Department of Human Services,* 884 F.2d 943 (6th Cir. 1989); *Kyees v. County Department of Public Welfare of Tippecanoe County,* 600 F.2d 693 (7th Cir.1979); *Drummond v. Fulton County Depart. of Family & Children's Services,* 563 F.2d 1200 (5th Cir.1977); *Johnson v. Burnett,* 182 Ill.App.3d 574, 538 N.E.2d 892 (1989); *In Interests of A.C.,* 415 N.W.2d 609 (Iowa 1987); *In re Adoption/Guardianship No. 2633,* 101 Md.App. 274, 646 A.2d 1036 (1994); *Adoption of a Minor,* 386 Mass. 741, 438 N.E.2d 38 (1982); *In re Dependency of J.H.,* 117 Wash.2d 460, 815 P.2d 1380 (1991); *Engstrom v. Iowa,* 461 N.W.2d 309, 319 (Iowa 1990) (Pre-adoptive parents did not have protected liberty interest in prefamilial relationship with child who was to be adopted, such that termination of adoption proceedings, upon discovery that child's natural father was alive, would be actionable under § 1983.) Because the Petitioners did not have a constitutionally-protected liberty interest, their claim that the Missouri Judgment awarding custody of the

child to his mother is not entitled to full faith and credit falls short.[2]

In contrast, Respondent does have a constitutionally-protected liberty interest in the care, custody and management of her child. *Santosky v. Kramer,* 455 U.S. 745 (1982); *B.B. v. People,* 785 P.2d 132 (Colo.1990); *People ex. rel. M.B.,* 70 P.3d 618 (Colo. App. 2003). In *Troxel v. Granville,* 530 U.S. 57, 65 (2000), the United Supreme Court held that "[t]he liberty interest . . . of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by this Court."

V. PETITIONERS ARE NOT ENTITLED TO EXTRAORDINARY RELIEF BECAUSE THEY COME TO THIS COURT WITH "UNCLEAN HANDS."

Petitioners claim that there is no adequate remedy at law and therefore they are entitled to equitable relief from this Court. Petitioners allege irreparable harm because the child has been with them for nine months. Petitioners, however, come to this Court with unclean hands and therefore are not entitled to invoke the equity powers of this Court. In *Salzman v. Bachrach,* 996 P.2d 1263 (Colo. 2000), this Court explained the doctrine:

> In Colorado, the clean hands maxim dictates that one who has engaged in improper conduct regarding the subject matter of the cause of action

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[2] For the same reason, their claim that the trial court erred in dismissing their petition without an evidentiary hearing also falls short. *See* discussion, *supra.*

> may, as a result, lose entitlement to an equitable remedy. *See Rhine v. Terry,* 111 *Colo.* 506, 508, 143 P.2d 684, 684 (1943). The clean hands doctrine is one of public policy, devised to protect the integrity of the court. *See id.* at 508, 143 P.2d at 685.

996 P.2d at 1269. The doctrine applies only when "the improper conduct [relates] directly to the underlying litigation. In other words, the inequitable conduct must have an immediate and necessary relation to the claims under which relief is sought." *Ajay Sports, Inc. v. Casazza,* 1 P.3d 267 (Colo.App.2000), *citing Nakahara v. NS 1991 American Trust,* 718 A.2d 518, 522 (Del.Ch.1998). Petitioners' conduct in this case in refusing to abide by terms of the agreement that they signed acknowledging that the placement was "legally at risk" and agreeing to return the child in the event the termination of parental rights did not occur, and their refusal to abide by the terms of a Missouri Court Order and seeking to circumvent the Missouri Court Order by filing in Colorado a legally and factually misleading Petition seeking allocation of parental rights while continuing to challenge in the Missouri courts the Missouri Court order can at best be characterized as improper.

On July 25, 2003, six months ago, the natural Mother filed with the Circuit Court for St. Charles County filed a Motion to Withdraw and Revoke Consent to Adoption. At that time, the child had been with the Petitioners for a period of three months. Missouri Law (Mo. St. 253.030(7)) specifically provides that a birth mother's written consent can be withdrawn anytime prior to the acceptance of the written consent by a judge. Petitioners had knowledge that the written consent had not been accepted by the

court at the time Respondent filed her Motion to Withdraw and Revoke Written Consent. The Petitioners, notwithstanding the fact that they had signed a document entitled "Legally at Risk Placement" wherein they agreed that they would return the child in the event that termination of parental rights did not occur, rather than returning the child, refused to do so and insisted on going forward with the Petition for Adoption in Missouri which they had initiated. When the Missouri Court ruled against them on October 15, 2003, three and one-half months ago, rather than obeying the Missouri Court order, the Petitioners continued to challenge that order by both filing proceedings in Colorado while at the same time requesting that the Missouri Court reconsider its ruling. Despite the fact that both the Missouri Courts and the Colorado District Court have ordered Petitioner to return the child, the Petitioners have refused to do so and have continued with litigation.

The child has remained in Petitioner's custody for an additional six months since they first were informed that Respondent had revoked her consent to termination of parental rights and adoption and for an additional three and one-half months since the Missouri Court first ordered them to return the child to his mother. Petitioners cannot rely on their refusal to abide by the terms of the agreement they previously signed and their refusal to obey valid court orders as justification for why no other adequate remedy is available. It is the Petitioners who have refused to allow the Respondent to establish a relationship with her child and any bond that might have been established is a direct result of the Petitioners' obstructionist and selfish behavior.

Two courts – the Circuit Court for St. Charles County Missouri, as well as the District Court for Jefferson County, Colorado – have ordered the Petitioners to immediately return the child to Respondent, the natural mother of the child, and they have refused to do so, thus preventing the natural mother and the child to establish a bond. Moreover, not only have the Petitioners refused to abide by the court orders of two states, they have also deliberately breached the terms of their agreement that they would immediately return the child to Respondent or her intermediary in the event that Respondent revoked her consent. Petitioners should not be allowed to benefit from their own misdeeds. What the Petitioners are requesting is that this Court stay a valid court order awarding custody of the minor child to Respondent, the natural parent of that child, thus continuing to deprive the Respondent of her constitutionally-protected liberty interest in the care, custody and control of her child so they can continue to pursue custody of a child to which they have no legally cognizable interest. *See Troxel v. Granville, supra,* 530 U.S. at 65; *Santosky v. Kramer, supra; B.B. v. People, supra; People ex. rel. M.B., supra.*

Petitioners obtained custody of the child when the Missouri Courts entered an Order granting them temporary legal custody. That order stated that it was effective only until further order of the court. The Missouri Court has since ruled, awarding custody of the child to his mother, Respondent herein. As this Court stated in *L.G. v. People,* 890 P.2d 647 (Colo. 1995), the purpose behind the UCCJEA is to "limit jurisdiction over custody decrees to one state, thereby eliminating the incentive for forum shopping." The Petitioners' actions in filing the Petition for Allocation of Parental Rights days after the Missouri

Court awarded custody of the child to Respondent can only be characterized as forum shopping. If this Court grants Petitioners the relief they request, it is in essence rewarding forum shopping, thus encouraging jurisdictional battles and rewarding Petitioners' attempt to circumvent the UCCJEA and the ICPC, as well as their deliberate breach of their explicit agreement to return the child to Respondent in the event she decides not to relinquish her rights to the child. Because they come to this Court with unclean hands, this Court should refuse to intercede and grant them the relief they request.

CONCLUSION

Petitioner requests that this Court discharge the Order to Show Cause and remand this matter to the district court for the limited purpose of determining if Respondent is entitled to attorney fees and costs pursuant to C.R.S. §14-13-312 and if so the amount to which she is entitled.

Respectfully submitted this 30th day of January, 2004

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